No. 97-1578

FILED
JUN 5 1998
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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HOECHST CELANESE CORPORATION,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## REPLY TO BRIEF IN OPPOSITION

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June 5, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## REPLY TO BRIEF IN OPPOSITION

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### INTRODUCTION

EPA has it wrong. This seemingly "little case"—which the government would dismiss out of hand—is much more important to the nation than EPA will ever admit. The point of this case is that EPA—though pursuing the worthy goal of environmental protection—has far exceeded any power it has or could ever have under our system of government. This case is about separation of powers; about who says what the law is; about the remedy that a citizen is entitled to once a court has ruled that the federal government has infringed his rights.

EPA has every incentive to say to this Court, "don't look at this case" because this case demonstrates that EPA has found a way to make itself a law unto itself. And EPA does not want to be "found out" even though the result of its actions is that there is greater uncertainty

about what its rules mean and more obstacles in the paths of those that want to comply.

**THE MANNER IN WHICH THE FOURTH CIRCUIT "DEFERRED" TO EPA IS COMPLETELY AT ODDS WITH THE PURPOSE AND INTENT OF DEFERENCE AS ARTICULATED BY THIS COURT.**

The present day incarnation of the deference standard dates back to *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), where this Court said that an agency's "interpretation [of its own regulations] becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. In the 53 years since *Seminole Rock* was decided, the essence of the "plainly erroneous or inconsistent with the regulation" phrase has been eaten away until today the Fourth Circuit—and other circuits—act as if *Seminole Rock* stands for the raw proposition that, in almost all circumstances, an agency's interpretation of its own regulations must be given "controlling weight."

Had the federal courts consistently followed the actual holding in *Seminole Rock*, they would have retained the ability to look at objective criteria in determining the propriety of agency conduct. In this case, that would have meant an examination of the actual language of the rule, what the Administrator actually said in the accompanying preamble, and the actual examples used by EPA at the time of promulgation.

The preamble to the final benzene NESHAP, in fact, describes the types of sources that were to be covered by the exemption: **both** "small process units" **and** "process units that use minor amounts of benzene."[1] HCC's Celriver Plant—with thousands of pieces of equipment in benzene service—is clearly not a small unit. But Celriver

[1] *See* App. 112a. The government's opposition to HCC's petition for certiorari noticeably fails to acknowledge that part of the preamble that says the exemption applies to process units that use minor amounts of benzene. *See* Opp'n at 9.

was a *user of a minor amount of benzene* when compared to the key targets of the original benzene NESHAP rulemaking: benzene producers and feedstock users. At the time EPA was developing the benzene NESHAP, production facilities and feedstock users of benzene annually produced and used millions of megagrams of benzene and were responsible for 99.5% of all benzene emissions.[2] Compared to such sources, a facility like Celriver—that had on site only a few hundred megagrams of benzene per year—was indisputably a user of "minor amounts" of benzene.

Even more importantly, the preamble to the final benzene NESHAP contains a specific example of how the exemption applied to a user of minor amounts of benzene. (App. 113a.) The example concerned a pharmaceutical company that, just like HCC's Celriver Plant, used recycled benzene as a solvent and had far more than a thousand pieces of equipment in benzene service. Similarly, the pharmaceutical company's facility used a lot more than 1,000 megagrams of benzene if the benzene were to be counted over and over again as it recycled through the facility's processes. And, like Celriver, that pharmaceutical company's facility was designed to consume (*i.e.*, "use up")[3] several hundred megagrams of benzene (but less than 1000 megagrams of benzene) per year.[4] In the preamble, EPA established that facilities that used or consumed benzene in this way and in these amounts *were exempt* from the NESHAP.

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[2] *See* 4th Cir. J.A. at 392, 402, 552-55.

[3] Despite the government's claim to the contrary (Opp'n at 9), HCC has repeatedly explained that, while the word "use" can admit of more than one interpretation, EPA in the preamble to the rule resolved any ambiguity in this regard by establishing that, in the context of the exemption, "use" of benzene means a single counting of benzene. *See* Cert. Pet. at 3; App. 42a.

[4] To maintain their financial viability, benzene-recycling processes must remain efficient, *i.e.*, they have to minimize their leakage of benzene. Thus, before EPA developed its own program in the 1984

These authoritative statements by the Administrator—presented in the final rule—should have been binding upon EPA and should have led to a quick disposition of this case in favor of HCC. After all, that is what EPA had said the rule was.

Yet, EPA has—in six years of litigation—been able to slip the constraints of its own published rule by piecing together snippets of the rulemaking record to present a story that reads well but is so out-of-kilter with what EPA actually said at the time of NESHAP promulgation that:

- All four judges who have reviewed this case have concluded that EPA's "story" could not have been gleaned by HCC from the regulatory language, the preamble, or the rest of the record (App. 17a-18a, 28a, 62a);
- Regulators from EPA's own staff and from Virginia and Texas failed to comprehend what EPA now says its rule means (App. 54a-57a); and
- It conflicts with the unrebutted expert testimony about the plain meaning of the technical terms that underlie the rule.[5]

EPA has glossed over all these inconsistencies by claiming that its current interpretation is consistent with the

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NESHAP, Celriver had in place a benzene leak detection and repair program. As a result of that program, Celriver's annual consumption of benzene was far less than the 1,000 megagram exemption cut-off (*see* 4th Cir. J.A. at 296). Indeed, it was significantly less than the 325 megagrams consumed by the preamble-discussed pharmaceutical facility. (App. 113a.)

[5] *See* Cert. Pet. at 15 n.13. For example, although EPA now claims that the exemption was based upon a plant's design production capacity (Opp'n at 3), that concept—like nameplate capacity—is a single count concept. (App. 185a.) "Indeed, none of the capacity data studied by EPA [during the rulemaking] involved quantities inflated by some form of multiple counting of internal recycle. This is despite the fact that virtually all producers and most benzene-using facilities, by their very nature, have internal recycle." (App. 185a-186a.)

alleged "purpose" of the rule. (Opp'n at 9 n.5.) And the Fourth Circuit deferred to EPA's interpretation because that interpretation "harmonizes with the purpose of [the Clean Air Act]." (App. 8a.)

It is irrelevant to the proper disposition of the instant case, though, that regulation of the Celriver Plant can be "harmonized with the purposes" of the Clean Air Act. That means only that EPA **could** have promulgated an exemption to the benzene NESHAP that is based on multiple counting. Because that is not what EPA said it was doing—in either its regulatory language or the accompanying preamble—that is not a permissible way to interpret the exemption now before the Court.[6]

The Court should grant certiorari in this case to make clear to the federal courts that there are real limits to deference and that this Court did not in 1945—nor does it today—intend for deference to mean that federal agencies can engage in the kind of "revisionist rulemaking" evident in this case.

## UNLESS LIMITS ARE PLACED ON THE APPLICATION OF *SEMINOLE ROCK*'S DEFERENCE STANDARD, *SEMINOLE ROCK* SHOULD BE OVERTURNED, AND THIS IS THE VEHICLE FOR DOING SO.

EPA argues in its Opposition that overturning *Seminole Rock* is essentially unthinkable because that decision has been in place since 1945 and its progeny has built up over the years. HCC disagrees because, in HCC's view, the longer a faulty legal concept is allowed to stand, the more compelling is the reason to swat it down. As members of this Court have observed, "[w]isdom too often never

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[6] Nor is it appropriate for EPA to try to distance itself from the Administrator's explanation of the exemption at the time of promulgation by claiming that explanation was a "mistake" or "accident." *See* 4th Cir. J.A. at 65-66, 72-73. If it was a mistake, EPA should have used notice-and-comment rulemaking procedures to correct its mistake, as required by the Administrative Procedure Act and Clean Air Act. *See* Cert. Pet. at 5.

comes, and so one ought not to reject it merely because it comes late." *See, e.g., Spencer v. Kemna*, —— U.S. ——, 118 S.Ct. 978, 990 (1998) (Ginsburg, J., concurring), *quoting Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

EPA contends that HCC has not given a good reason for overturning *Seminole Rock* and its progeny. But HCC argued in its Petition (Cert. Pet. at 19-24) and repeats here that EPA is being allowed to usurp the judicial function, *i.e.*, violate separation of powers. HCC is not the first or only one to see the harm that *Seminole Rock* has led to and to call for a new look by this Court at that decision. In his article, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996), Professor John F. Manning discusses the need for this Court to revisit *Seminole Rock*. He argues that *Seminole Rock* and its progeny, "contradict[] a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties." *Id.* at 617 (footnote omitted).

Also, despite the commonly perceived close association between deference to agency interpretations of their own regulations under *Seminole Rock* and the deference courts give to agency interpretations of statutes they are charged with implementing under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the logic of *Chevron* runs contrary to the notion that an agency, having adopted a rule whose meaning is unclear, should be deemed as also having the authority to state virtually conclusively what that meaning is through a post-promulgation interpretation. For whereas "*Chevron* retains *one* independent interpretive check on lawmaking by Congress, *Seminole Rock* leaves in place *no* independent interpretive check on lawmaking by an administrative agency." Manning at 639 (emphasis in original).

EPA is similarly wrong in claiming that to depart from *Seminole Rock* would "encourage litigation and prolong

uncertainty concerning the meaning of regulations." (Opp'n at 11.) The instant case concerns a regulatory provision first promulgated 14 years ago. It is hard to imagine that departing from *Seminole Rock* could "prolong uncertainty" over the "meaning of regulations" any longer than is now the case.

Nor is there any merit to EPA's contention that to depart from *Seminole Rock* would "encourage litigation." HCC submits that getting rid of the *Seminole Rock* line of cases could well serve to curb litigation: once agencies know that the federal courts will no longer give "knee-jerk" deference to agency interpretations of their rules, those agencies would try harder to promulgate clearer, more readily understandable rules. And that would lead to less litigation.

**EPA MISSES THE POINT OF HCC'S ARGUMENT THAT ONCE A COMPANY GETS GOOD NOTICE, IT IS ENTITLED TO A REASONABLE TIME IN WHICH TO COMPLY.**

The Fourth Circuit ruled in HCC's favor with respect to "fair notice," agreeing that HCC's Celriver Plant did not, at the outset, receive the notice of the meaning of the rule that the Constitution calls for. Rather, said the Fourth Circuit, Celriver did not receive notice of the meaning of the rule until five years later, in the summer of 1989.[7]

HCC submits that once the Fourth Circuit concluded that fair notice came late in the day, it should have fash-

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[7] Despite the government's claims to the contrary (Opp'n at 11-12), HCC has never conceded that it had violated the benzene NESHAP, although the company had substantially met (and, in some instances, exceeded) the terms of NESHAP by September 1991. Moreover, for the reasons explained by both Judge Anderson (App. 69a) and Judge Niemeyer (App. 33a), nothing that HCC received from EPA Region 4 in or after the summer of 1989 constituted "actual notice" that multiple counting was the Agency's authoritative interpretation since it conflicted with the preamble and, even after the summer of 1989, EPA representatives continued to espouse differing interpretations of the exemption.

ioned a remedy that would have put HCC in at least no worse a position than HCC would have been in had HCC received good notice from the start. But the Fourth Circuit did just the opposite. Its remedy with respect to "fair notice"—saying that HCC would be liable for violating EPA's rule if it did not meet the numerous terms of that rule within just 90 days—puts HCC in a much worse position than it would have been in had it gotten proper notice at the outset.

Contrary to what EPA says, HCC's position is not that it "was entitled to a waiver of the [NESHAP] requirements for two years after receiving EPA's letters in the summer of 1989." (Opp'n at 12.) Rather, HCC contends that, under basic principles of due process, a regulated party—upon being given actual notice of an agency's regulatory interpretation—is entitled to a reasonable period of time in which to conform to that interpretation. Absent that, the "fair notice" concept, as most recently expressed in such cases as *General Elec. Co. v. EPA*, 53 F 3d 1324, 1328-31 (D.C. Cir. 1995), is shorn of most, if not all, of its meaning and effect.

Thus, rather than contending it had a "right" to a waiver, HCC asserts that in deciding whether HCC had met the terms of the NESHAP "within a reasonable time" following receipt of actual notice, it was fitting and proper for the district court to take into account the compliance time-frame set out by § 112 of the Clean Air Act and EPA's own rules. Those provisions gave regulated entities at least 90 days in which to comply and the opportunity to obtain a waiver for up to two years in which to achieve compliance. *See* 4th Cir. J.A. at 78a-79a, 156a. Those two provisions establish that a two-year compliance period is reasonable for someone who got good notice at the start of the process.[8] Because it is undisputed that

[8] Had HCC received notice that it was subject to the NESHAP at the time the rule was promulgated, it would have been prepared to move promptly to apply for the waiver that was then available.

HCC met virtually all the terms of the benzene NESHAP at its Celriver Plant within the two-year time frame that both Congress and EPA have defined to be reasonable, HCC should not be subject to liability within that two-year period. If it is subject to liability starting 90 days from receipt of good notice, HCC is in a much worse position than it would have been in with good notice from the start.

The district court understood and agreed with this reasoning. Indeed, the court found that HCC "acted responsibly to meet—and far exceed—the terms of the NESHAP in advance of EPA-accepted deadlines" and thus that a finding of liability for its compliance within that stipulated time frame would be inconsistent with "fundamental considerations of fairness." (App. 69a-70a.)

The Fourth Circuit's majority holding to the contrary—a holding that HCC was "necessarily" required to have been in compliance in no more than 90 days—is unjust. It penalizes HCC for EPA's failure to have provided fair notice of its multiple counting interpretation in 1984, when there were procedures in place which would have allowed HCC to seek additional time to comply.

It is important that the Court take this case and reverse the Fourth Circuit, not only to correct an injustice but to clarify how the concept of "actual notice" is to work in relation to the "fair notice" principle. As best HCC can determine, there are no other decisions in which a court has grappled with the issue of how much time should be considered reasonable for a regulated entity to come into compliance with a regulation after an agency has sup-

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Five years later, that waiver was no longer available—the chance to seek it expired in September 1984 (*see* App. 156a)—and it was unclear what procedures HCC was supposed to follow in order to secure a reasonable time in which to meet the standards. So HCC did the best it could: it met with EPA representatives and followed a compliance course consistent with the one it set out for EPA and to which EPA never objected. *See* App. 69a-71a.

posedly provided that entity with "actual notice" of a regulatory interpretation.

It is inevitable, though, that the federal courts will face more regulatory enforcement cases construing *General Electric*'s "fair notice" principles. Indeed, this would appear all the more certain if the Court declines to revisit *Seminole Rock* or otherwise fails to impose some meaningful restrictions on courts that would otherwise give deference to any not "nonsensical" agency interpretation, thereby elevating the importance of "fair notice" as the last line of defense for the regulated community. At a minimum, therefore, this case provides the Court with the opportunity not only to correct the Fourth Circuit's error, but also to resolve and clarify other important fair notice-related issues that lower courts will be facing in the future.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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